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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-220

NELLIE POPE, ADMINISTRATRIX
PETITIONER,

v.

MOORE-MCCORMACK LINES, INC.
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS COUNTY OF SUFFOLK

DAVID B. KAPLAN
89 State Street
Boston, Massachusetts
Attorney for Petitioner

ROBERT S. WOLFE
89 State Street
Boston, Massachusetts
On Brief

Blanchard Press, Inc., Boston, Mass. — Law Printers

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MOORE-MCCORMACK LINES, INC.
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS COUNTY OF SUFFOLK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Nellie Pope, Administratrix of the Estate of Rudolph Campbell, respectfully prays that a writ of certiorari issue to the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, to review the judgment of that Court entered on the 17th day of May 1971, pursuant to rescript entered by the Supreme Judicial Court of the Commonwealth of Massachusetts on the 4th day of May, 1971. The said judgment has been docketed, and a copy of that docket entry is appended here-

to and marked Appendix A. The rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts overruling petitioner's exceptions is in the official record of the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, a copy of which is appended hereto and marked Appendix B.

I.
Opinion Below

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts does not yet appear in the official reporter. It is contained in the official record of the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, a copy of which is appended hereto and marked Appendix C. It also appears in volume 269 of the second series of the Northeast Reporter at page 706.

II.
Jurisdiction

The judgment of the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, now sought to be reviewed was entered on the 17th day of May, 1971. Entry was pursuant to a decree rendered by the Supreme Judicial Court of the Commonwealth of Massachusetts on the 4th day of May, 1971. There were no rehearings or motions. Therefore, this petition falls within the time prescriptions of Title 28 of the United States Code, Section 2101.

Jurisdiction to review the aforesaid proceedings exists by virtue of Title 28 of the United States Code, Section 1257.

III.
Question Presented

Where an administratrix prosecutes in a state court derivative and non-derivative causes of action arising out of the wrongful death of a seaman upon the high seas, does the state court possess jurisdiction of a cause of action for wrongful death pleaded under the Death On the High Seas Act §§ 1-7, 46 U.S.C. §§ 761-68 (1964)?

IV.
Statutes Involved

The case involves the following statutes:

Death on the High Seas Act, §§ 1-7, 46 U.S.C. §§ 761-68 (1964) (Relevant portions reproduced in Appendix D and hereinafter cited as DOHSA)
Jones Act § 1, 46 U.S.C. § 688 (1964) (Relevant portions reproduced in Appendix E and hereinafter cited as Jones Act)
28 U.S.C. § 41(3) (1940) (Relevant portions reproduced in Appendix G)
28 U.S.C. § 1333 (1964) (Relevant portions reproduced in Appendix F)
G.L. (Ter.Ed.) c. 212 § 4 (1954) (Reproduced in Appendix H)
M.G.L.A. c. 229 § 1 et seq (1967) (Relevant portions reproduced in Appendix I)

V.
Statement of Facts

On or about the 14th day of September, 1967, the petitioner's intestate sustained injuries aboard the respond-

ent's vessel S.S. Mormacscan while upon the high seas. At the time said injuries were sustained, the petitioner's intestate was a seaman and member of the crew of the S.S. Mormacscan. As a result of said injuries, the petitioner's intestate expired on the 25th day of September, 1967.

VI.
History of Proceedings

On the 21st day of September, 1967, the petitioner brought an action in state court against the respondent for derivative and non-derivative claims arising out of the death of the petitioner's intestate. The trial court was asked in five counts of the petitioner's Declaration to provide the petitioner with monetary relief. Count I alleged a derivative cause of action under the Jones Act for personal injuries sustained as a result of the defendant's negligence. Count II alleged a derivative cause of action under the General Maritime Law for personal injuries sustained as a result of the unseaworthiness of the defendant's vessel. Count III alleged a non-derivative cause of action under the Jones Act for death sustained as a result of the defendant's negligence. Count IV alleged a non-derivative cause of action under the General Maritime Law for burial expenses. Count V alleged a non-derivative cause of action under the DOHSA for death sustained as a result of the negligence of the defendant and the unseaworthiness of the defendant's vessel.

The respondent filed an Answer which both denied all allegations contained in the Declaration and asserted various affirmative defenses. The respondent also filed a Demurrer to Count V on the ground that a state court had no jurisdiction to entertain a cause of action pleaded

under the DOHSA. The trial court sustained the Demurrer and exception was duly taken by the petitioner.

After a hearing of the case, an adverse verdict was rendered on Counts I, II and III. Recovery was allowed on Count IV. The petitioner timely filed its Bill of Exceptions and the Supreme Judicial Court of the Commonwealth of Massachusetts subsequently reviewed said Bill. That Honorable Court affirmed the ruling of the trial court on the Demurrer and held that the courts of the Commonwealth of Massachusetts were without jurisdiction of a cause of action pleaded under the DOHSA.

VII.

Considerations Governing Review On Certiorari

Several state courts have ruled on the question at bar but this Honorable Court has not.

Decisions of state courts finding state and federal court concurrent jurisdiction:

Bugden v. *Trawler Cambridge,* 319 Mass. 315, 65 N.E.2d 533 (1946); *Ledet* v. *United States Aircraft Corp.,* 10 N.Y.2d 258, 176 N.E.2d 820 (1961); *Wyman* v. *Pan-American Airways, Inc.,* 181 Misc. 963, 43 N.Y.S.2d 420, aff'd 267 App. Div. 947, 48 N.Y.S.2d 459, motion for leave to appeal denied 267 App. Div. 983, 49 N.Y.S.2d 271, cert. denied 324 U.S. 882 (1943); *Choy* v. *Pan-American Airways Co.,* 1941 A.M.C. 912 (N.Y. Sup. Ct. 1941), aff'd 262 App. Div. 995, 30 N.Y.S.2d 816 (1941); *Kirstanson* v. *Steinfeldt,* 256 App. Div. 824, 9 N.Y.S.2d 790 (1939); *Colbert* v. *Steinfeldt,* 255 App. Div. 790, 7 N.Y.S.2d 373 (1938); *Elliot* v. *Steinfeldt,* 254 App. Div. 739, 4 N.Y.2d 9 (1938);

Murphy v. *Steinfeldt*, 254 App. Div. 741, 4 N.Y.S. 2d 10 (1938).

Decisions of state courts finding exclusive federal court jurisdiction:

Gordon v. *Reynolds*, 187 Cal. App. 2d 472, 10 Cal. Rptr. 73 (1960), hearing denied by Sup. Ct. (1961); *Boudreau* v. *Boat Andrea G. Corporation*, 350 Mass. 473, 215 N.E.2d 907 (1966).

Decisions of the Supreme Court of the United States refusing to consider question:

Hess v. *United States*, 361 U.S. 314, 320 (1960).

Several state courts have ruled on the question at bar in a manner not in accord with applicable decisions of this Honorable Court.

Decisions of state courts finding exclusive federal court jurisdiction:

Gordon v. *Reynolds*, supra.; *Boudreau* v. *Boat Andrea G. Corporation*, supra.

Decisions of the Supreme Court of the United States suggesting the existence of concurrent state and federal court jurisdiction:

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375, 401 fn. 14 (1970); *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148, 165 (1964); *Goett* v. *Union Carbide Corporation*, 361 U.S. 340, 345-47 (1960) (Mr. Justice Whittaker's dissent); *Romero* v. *International Term. Operating Co.*, 358 U.S. 354, 373 (1959); *The M/V "Tungus"* v.

Skovgaard, 358 U.S. 588, 600-9 (1959) (Mr. Justice Brennan's dissent with whom Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas join, concurring in part and dissenting in part).

Many lower United States Courts have ruled on the question at bar and used various contradicting theories in support of said rulings.

Compare, Dore v. *Link Belt Company,* 391 F.2d 671 (5th Cir. 1968), rev'd on other grounds by *Rodrique* v. *Aetna Casualty and Surety Company,* 395 U.S. 352 (1969); *Berry* v. *Pacific Sportfishing, Inc.,* 372 F.2d 213 (9th Cir.), cert. denied, 389 U.S. 821 (1967); *Blumenthal* v. *United States,* 189 F. Supp. 439 (E.D.Pa. 1960), aff'd 306 F.2d 16 (3rd Cir. 1962); *Trihey* v. *Transocean Air Lines, Inc.,* 255 F.2d 824 (9th Cir.), cert. denied, 358 U.S. 838 (1958); *Turner* v. *Wilson Line of Massachusetts,* 142 F. Supp. 264 (Mass. 1956), aff'd, 242 F.2d 414 (1st Cir., 1957); *Middleton* v. *Luckenback, S.S. Co.,* 70 F.2d 326 (2nd Cir.), cert. denied, 293 U.S. 577 (1934); *Canillas* v. *Joseph H. Cortes, Inc.,* 280 F. Supp. 48 (S.D.N.Y. 1968); *Scott* v. *Middle East Airlines Co., S.A.,* 240 F. Supp. 1 (S.D.N.Y. 1965); *Cunningham* v. *Bethlehem Steel Co.,* 231 F. Supp. 934 (S.D.N.Y. 1964); *Grigsby* v. *Coastal Marine Service of Texas, Inc.,* 235 F. Supp. 97 (W.D. La. 1964); *Jennings* v. *Goodyear Aircraft Corporation,* 227 F. Supp. 246 (Del. 1964); *Pardonnet* v. *Flying Tiger Line, Inc.,* 233 F. Supp. 683 (N.D. Ill. 1964); *Devlin* v. *Flying Tiger Lines, Inc.,* 220 F. Supp. 924 (S.D.N.Y. 1963); *Williams* v. *Moran, Proctor, Mueser & Rutledge,* 205 F.

Supp. 208 (S.D.N.Y. 1962); *Kunkel* v. *United States,* 140 F. Supp. 591 (S.D.Cal. 1956); *Higa* v. *Transocean Airlines,* 124 F. Supp. 13 (Hawaii 1954), aff'd 230 F.2d 780 (9th Cir. 1955), dismissed 352 U.S. 802 (1956); *Wilson* v. *Transocean Airlines,* 121 F. Supp. 85 (N.D. Cal. 1954); *Montgomery* v. *Goodyear Tire & Rubber Co.,* 231 F. Supp. 447 (S.D.N.Y. 1964); *Abbott* v. *United States,* 207 F. Supp. 468 (S.D.N.Y. 1962); *with, Safir* v. *Compagnie Generale Transatlantique,* 241 F. Supp. 501 (E.D.N.Y. 1965); *Sierra* v. *Pan-American World Airways,* 107 F. Supp. 519 (P.R. 1952); *Batkiewicz* v. *Seas Shipping Co., Inc.,* 53 F. Supp. 802 (S.D.N.Y. 1943); *Powers* v. *Cunard S.S. Co., Ltd.,* 32 F.2d 720 (S.D.N.Y. 1925).

The question at bar is important and deserving of treatment by this Honorable Court.

The Federal Courts are overcrowded and threatened with an inability to handle significant issues in a thorough manner. A finding of concurrent state and federal court jurisdiction would permit a lessening of the case load burden on lower federal courts.

Exclusive jurisdiction in federal courts also results in multiplicity of actions. An administrator of an estate may be able to prosecute most non-derivative claims and all derivative claims in a state court but be compelled to bring non-derivative claims under the DOHSA in United States District Court.

See generally American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, Section 1316 and Commentary pp. 34-35, 236-37, (1969); Forde, Concurrent Jur-

isdiction of State and Federal Courts in Actions Under the Federal Death on the High Seas Act, 13 Trial Lawyers Guide 61 (1969).

This Honorable Court's most recent decision concerning wrongful death in admiralty has cast grave doubt upon the continuing vitality of time honored precedent. There is significant language in the opinion of *Moragne* v. *States Marine Lines, Inc.* supra, indicating the existence of state and federal court concurrent jurisdiction; this language is in derogation of many prior lower federal court opinions.

> *Compare, Moragne* v. *States Marine Lines, Inc.*, supra at 401 fn. 14; *with, e.g., Dore* v. *Link Belt Company,* supra; *Berry* v. *Pacific Sportfishing, Inc.,* supra; *Turner* v. *Wilson Line of Massachusetts,* supra; *Trihey* v. *Transocean Air Lines. Inc.,* supra; *Middleton* v. *Luckenback S.S. Co.,* supra.

With the advent of the *Moragne* decision, this long unresolved issue would now seem ripe for resolution.

VIII.
Argument

Where an administratrix prosecutes in a state court derivative and non-derivative causes of action arising out of the wrongful death of a seaman upon the high seas, the state court possesses jurisdiction of a cause of action for wrongful death pleaded under the DOHSA.

Section 1 of the DOHSA specifies that the personal representative of a person who dies as a result of a wrongful act

". . .may maintain a suit for damages in the district courts of the United States, in admiralty. . . ."

46 U.S.C. § 761 (1964)

There is however no language specifically precluding the exercise of jurisdiction by a state court.

Rules of statutory interpretation suggest the existence of state and federal court concurrent jurisdiction of a cause of action pleaded under the DOHSA absent specific exclusionary language in that act.

State courts are customarily granted concurrent jurisdiction with federal courts of federal statutory causes of action where congress has not otherwise provided.

> *Clafin* v. *Houseman,* 93 U.S. 130, 136 (1876); Hamilton, The Federalist, No. 82 (1788).

When a federal statute creates a remedy which is subject to state court jurisdiction, a state court is bound to provide a forum.

> *Testa* v. *Katt,* 330 U.S. 386 (1947).

If the DOHSA cannot be construed as a grant of jurisdiction to state courts of a federal cause of action, the act contains language indicating that state statutes of general jurisdiction are applicable.

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." § 7, 46 U.S.C. § 767 (1964).

The language specifically granting jurisdiction to federal district courts in admiralty should not be deemed exclusionary. It has long been held that where a federal sta-

tute creates a remedy and specifically grants jurisdiction of the remedy to federal courts, a state court also has jurisdiction under a state statute of general jurisdiction barring federal statutory language explicitly prohibiting the exercise of state court jurisdiction:

> ". . .jurisdiction is not defeated by implication. And, considering the relation between the Federal and state government, there is no presumption that congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal Statute."
>
> *Galveston, H. & S.A.R. Co.* v. *Wallace,* 223 U.S. 481 (1912). See also *United States* v. *Bank of New York & Trust Co.,* 296 U.S. 463 (1936).

There are at least two possible reasons for the specific grant of jurisdiction. The first is that the drafters of the DOHSA desired to ensure that at least admiralty courts be given jurisdiction of the cause of action created.

> See generally *Moragne* v. *States Marine Lines, Inc.,* supra at 401 fn. 14.

The second is that the drafters did not wish to compel the state courts to furnish a forum for the federal cause of action.

> See generally *Testa* v. *Katt,* supra.

The Commonwealth of Massachusetts has a statute conferring general jurisdiction to Superior Courts of the Commonwealth.

> G.L. (Ter. Ed.) c. 212 § 4 (1954).

This statute has been held to confer jurisdiction of causes of action sounding in admiralty.

> *Proctor* v. *Dillon*, 235 Mass. 538, 129 N.E. 265 (1920); *Boudreau* v. *Boat Andrea G. Corporation*, supra.

There appears to be no reason why a state statute of general jurisdiction would be inapplicable.

> Cf. *Powers* v. *Cunard S.S. Co., Ltd.*, supra.

In view of the liberalism traditionally encouraged in interpreting statutes in the maritime area, it would seem inappropriate to restrictively interpret the jurisdictional grant to federal courts in the DOHSA as prohibiting state court exercise of concurrent jurisdiction.

> See generally *Gillespie* v. *United States Steel Corporation*, supra at 165.

Furthermore,

> "(D)eath statutes have their roots in dissatisfaction with the archaisms of the law ... it would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied."
>
> *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 350-51 (1937).

Yet if the DOHSA cannot be construed to confer jurisdiction on a state court or be deemed to permit the state court exercise of jurisdiction over the cause of action by virtue of a state statute of general jurisdiction, it can be argued that remedies and jurisdictional grants are available elsewhere.

The DOHSA has long been recognized as being remedial in nature. The statute does not create a right but rather provides a remedy for the vindication of a pre-existing right.

> *Moragne* v. *States Marine Lines, Inc.*, supra; *Goett* v. *Union Carbide Corporation*, supra at 345-47 (Mr. Justice Whittaker's dissent); *Hess* v. *United States*, supra at 330 (Mr. Justice Frankfurter's dissent); *The M/V "Tungus"* v. *Skovgaard*, supra at 601 (Mr. Justice Brennan's dissent); *Holly* v. *The Mandred Stansfield*, 269 F.2d 317, 320 (9th Cir. 1959); *King* v. *Pan-American World Airways*, 270 F.2d 355 (9th Cir. 1959), cert. denied 362 U.S. 928 (1960).

Pleading a cause of action under the DOHSA would, however, identify a right as well as specify a remedy. In the event that the remedy pleaded was without the jurisdiction of a state court, that state court would still have before it a right. The state court could then search to apply another remedy subject to that court's jurisdiction in order to vindicate the right still before it. A limitation of jurisdiction which is part of a remedial statute could logically be construed to only limit the application of the remedy created by that statute. Other remedies available to vindicate the pre-existing right would remain unrestricted.

> *Safir* v. *Compagnie Generale Transatlantique*, supra; *Ledet* v. *United Aircraft Corporation*, supra.

Utilization of this methodology is encouraged by the "savings to suitors" clause in section 1333 of Title 28 of the United States Code. It has been said of the "savings to suitors" clause that it saved

"... all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved."

> *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 123 (1924); *Cf. Panama R.R.* v. *Vasquey*, 271 U.S. 557 (1926) construing the "savings to suitors" clause as permitting concurrent state and federal court jurisdictions of Jones Act claims.

The "means" have included those remedies available in both state and federal law.

> *Waring* v. *Clarke*, 46 U.S. 441 (1847); *Romero* v. *International Terminal Operating Co.*, supra.

The "means" have both common and statutory law origins.

> See, e.g., former section 41(3) of 28 U.S.C. (1940). See also *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, reh. den'd 328 U.S. 878 (1946).

This methodology of "remedy borrowing" is also consistent with the reservation of state remedies in Section 7 of the DOHSA. If Section 7 has any vitality, it must at least preserve remedies already available in state courts to redress wrongs on the high seas resulting in death.

There are remedies and grants of jurisdiction in state and federal law which permit the vindication in state courts of the right pleaded under the DOHSA.

State wrongful death acts provide remedies and grants of jurisdiction in state courts for the vindication of rights abridged when a wrongful death occurs in admiralty.

State remedies for wrongful death are available whether the death occurs within state territorial waters

Western Fuel Co. v. *Garcia,* 257 U.S. 233 (1921); *Steamboat Co.* v. *Chase,* 83 U.S. 522 (1872).

or without.

The Hamilton, 207 U.S. 398 (1907); *The James McGee,* 300 F. 93 (S.D. N.Y. 1924).

Availability of these remedies is assured because the right identified in the DOHSA is pre-emptive only of substantive rights; it does not pre-empt alternative remedies.

Moragne v. *States Marine Lines, Inc.,* supra; *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920).

Accordingly, remedies provided in state wrongful death acts have been held sufficient to convey jurisdiction to state courts to vindicate non-derivative federal rights abridged through wrongful death in admiralty.

United States District Courts:

Safir v. *Compagnie Generale Transatlantique,* supra; *Sierra* v. *Pan-American World Airways,* supra; *Powers* v. *Cunard S. S. Co., Ltd.,* supra;

State Courts:

Ledet v. *United Aircraft Corporation,* supra.

These decisions are in consonance with the well recognized means of preserving federal derivative rights through application of state remedies provided in survival statutes.

Romero v. *International Term. Operating Co.,* supra; *Roth* v. *Cox,* 348 U.S. 207 (1954).

The question of whether a state remedy may be so repugnant to maritime law as to be inapplicable in admiralty has been left unresolved by this Honorable Court.

> *Hess* v. *United States,* supra at 320; But see *The Harrisburg,* 119 U.S. 199 (1886).

There is no likelihood that application of a state remedy would prevent federal uniformity or thwart federal preemption of state law in substantive areas.

> See generally *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920); *Lindgren* v. *United States,* 281 U.S. 38 (1930); *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205 (1917); *Chelentis* v. *Luckenback S. S. Co.,* 247 U.S. 372 (1918); *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406 (1953); *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255 (1920); *Hess* v. *United States,* supra at 324-6 (Mr. Justice Frankfurter's dissent).

Federal remedies are also available to permit the vindication in state courts of a right identified in the DOHSA.

This Honorable Court held in *Moragne* v. *States Marine Lines,* supra, that a cause of action for wrongful death in territorial waters existed by virtue of the General Maritime Law. The remedy recognized in that decision is available in both federal and state courts.

> See generally *Chappell* v. *Bradshaw,* 128 U.S. 132 (1888); *Testa* v. *Katt,* supra; *Carlisle Packing Co.* v. *Sandanger,* supra.

It follows that the remedy is available for the vindication of the federal right identified in the DOHSA.

Compare, Safir v. *Compagnie Generale Transatlantique,* supra; *Ledet* v. *United Aircraft Corporation,* supra; with, *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239 (1931); *McPherson* v. *Steamship South African Pioneer,* 321 F. Supp. 42, 47-8 (E.D.Va. 1971).

In view of the similarity between the rights involved surrounding wrongful death both within and without territorial waters under the General Maritime Law, it may be that the rights recognized in the *Moragne* decision are identical to the rights pleaded under the DOHSA. The similarity of substance between these right determinative bodies of law diminishes the efficacy of criticism concerning "remedy borrowing."

See generally Hart & Wechsler, Note On State Remedies For Federal Rights, The Federal Courts and the Federal System, 474-77 (1953).

State court jurisdiction of these state and federal remedies may be granted in both state remedial statutes and state statutes of general jurisdiction.

See, e.g., G.L. (Ter. Ed.) c. 212 § 4 (1954). The death statute in the Commonwealth of Massachusetts does not contain a separate grant of jurisdiction, M.G.L.A., c. 229 § 1, et seq. (1967), although death statutes of other states do. See, e.g., *Safir* v. *Compagnie Generale Transatlantique,* supra at 507, which suggests that the Decedent Estate Law of New York, McKenney's Consol. Laws, c. 13, § 130, is the source of state court jurisdiction.

There is little doubt that state courts possess jurisdiction of remedies under the General Maritime Law.

> *Boudreau* v. *Boat Andrea G. Corporation,* supra; *Proctor* v. *Dillon,* supra.

There is no doubt that state courts possess jurisdiction of remedies created under state statutory law.

Similarities existing between the cause of action pleaded under the DOHSA and those extant in the corpus of the General Maritime Law suggest that state and federal court concurrent jurisdiction may also exist in particular instances by virtue of pendent jurisdiction.

Pendent jurisdiction has been held to permit trial by jury of causes of action for unseaworthiness and maintenance and cure if a cause of action under the Jones Act is also alleged. In effect, a civil court is given concurrent jurisdiction with an admiralty court to decide a question under the General Maritime Law.

> *Fitzgerald* v. *United States Lines Company,* 374 U.S. 16; reh. denied 375 U.S. 870 (1963):

It seems anomalous that the rationale compelling the finding of pendent jurisdiction in *Fitzgerald* could fail to compel a finding of pendent jurisdiction in the case at bar. In both *Fitzgerald* and the case at bar, causes of action under the Jones Act were pleaded. In both *Fitzgerald* and the case at bar violation of rights under the General Maritime Law were alleged.

> Cf. *Batkiewicz* v. *Seas Shipping Co.,* supra.

The most recent decision of this Honorable Court relating to wrongful death in admiralty has suggested the existence of concurrent jurisdiction.

"We note that § 1 of the . . . (DOHSA) . . . which authorizes "a suit for damages in the district courts of the United States, in admiralty," has been construed to place exclusive jurisdiction on the admiralty side of the federal courts for suits under the Act, e.g., *Devlin* v. *Flying Tiger Lines, Inc.*, 220 F. Supp. 924 (D.C.S.D.N.Y. 1963), although there was earlier authority to the contrary. *Bugden* v. *Trawler Cambridge,* 319 Mass. 315, 65 N.E. 2d 533 (1946). If we found from the legislative history that Congress imposed exclusive jurisdiction because of a desire to avoid the presentation of wrongful death claims to juries, that might support an inference that Congress meant to forbid nonstatutory maritime actions for wrongful death, which might come before state or federal juries, Cf. *Fitzgerald* v. *United States Lines,* 374 U.S. 16, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963). However, that is not the case. The only discussion of exclusive jurisdiction in the legislative history is found in the House floor debates, during the course of which Senator Volstead, floor manager of the bill and chairman of the Judiciary Committee, told the members that exclusive jurisdiction would follow necessarily from the fact that the Act would be part of the federal maritime law. 59 Cong. Rec. 4485. This erroneous view disregards the "saving clause" in 28 U.S.C. § 1333, and the fact that federal maritime law is applicable to suits brought in state courts under the permission of that clause.

Moragne v. *States Marine Lines, Inc.*, supra at 401 fn. 14.

Many authoritative commentators have also concluded that concurrent jurisdiction exists.

See, e.g., American Law Institute, supra at § 1316 and Commentary pp. 34-5, 236-37; Benedict on Admiralty, Vol. 1, § 142, p. 382 (6th Ed. 1940); Forde, supra; Magruder and Grant, Wrongful Death Within the Admiralty Jurisdiction, 35 Yale L.J. 395, 420 (1926); Seminar of Current Developments in Admiralty Law, Sponsored by Illinois State Bar Association and American Trial Lawyers Association.

It has been widely recognized that concurrent jurisdiction is desirable.

See, e.g., American Law Institute, supra at § 1316 and Commentary at pp. 34-35 and 236-37; Forde, supra.

IX.
Conclusion

The issue now presented to this Honorable Court is deserving of resolution. In spite of the fact that the DOHSA has provided a remedy for wrongful death on the high seas since 1920, the precise nature of that remedy is still unknown. Only recently did this Honorable Court cast grave doubt upon the accuracy of the majority rule concerning this issue. There is reason to believe that the majority rule is unsound and deserving of rectification even without reference to recent decisions. It is therefore prayed that a writ of certiorari issue to the Superior Court of the Commonwealth of Massachusetts, County of Suffolk, so that this issue may be resolved.

David B. Kaplan
89 State Street
Boston, Massachusetts
Attorney for Petitioner

Robert S. Wolfe
89 State Street
Boston, Massachusetts
On Brief

Appendix A.

DOCKET ENTRY OF JUDGMENT

May 4, 1971. Exceptions overruled.
Rescript May 4, 1971.
Reasons as stated in rescript.

Appendix B.

RESCRIPT

Commonwealth of Massachusetts
Supreme Judicial Court for the Commonwealth
at Boston, May 4, 1971

In the case of

NELLIE POPE, administratrix

v.

MOORE-MCCORMACK LINES, INC.

pending in the Superior Court for the County of Suffolk

Ordered, that the following entry be made in the docket; viz.;

EXCEPTIONS OVERRULED

By the Court,

FREDERICK J. QUINLAN

Clerk

May 4, 1971

Appendix C.

OPINION OF THE COURT

Nellie Pope, administratrix

v.

Moore-McCormack Lines, Inc.

The declaration in this action of tort and contract contains five counts. A demurrer was sustained to count 5, and the other four counts were disposed of after trial by jury. Count 5 was brought under the Death on the High Seas Act, 46 U.S.C. §§ 761 et seq. (1964), and the ground of demurrer was that Federal Courts have exclusive jurisdiction of actions under that act. *Boudreau* v. *Boat Andrea G. Corp.*, 350 Mass. 473, 475-476. We are now asked to oevrrule the *Boudreau* case as inconsistent with a dictum in a footnote in the subsequent opinion in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 400, n. 14. See Forde, Concurrent Jurisdiction of State and Federal Courts in Actions Under the Federal Death on the High Seas Act, 1969 Trial Lawyer's Guide 27; Am. Law. Inst., Study of the Division of Jurisdiction between State and Federal Courts, § 1316 and Commentary, pp. 34-35, 236-237. We do not think that dictum is sufficiently clear to induce us to overrule the *Boudreau* case. Count 5 does not purport to state a claim under nonstatutory Federal maritime law, even if such a claim could now be tried in a State court. The defendant's claim that the jury verdict on count 2 renders count 5 moot is left for a court having jurisdiction of the claim stated in count 5.

Appendix D.

DEATH ON THE HIGH SEAS ACT

§ 1, 46 U.S.C. § 761 (1964)

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Appendix E.

JONES ACT

§ 1, 46 U.S.C. § 688 (1964)

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Appendix F.

28 U.S.C. § 1333 (1964)

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Appendix G.

28 U.S.C. § 41(3) (1940)

Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.

Appendix H.

G.L. (Ter. Ed.) c. 212 § 4 (1954)

The court shall have original jurisdiction of all civil actions, except those of which other courts have exclusive original jurisdiction.

Appendix I.

WRONGFUL DEATH ACT

M.G.L.A. c. 229 § 2 (1967)

A person who (1) by his negligence causes the death of a person in the exercise of due care, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, shall be liable in damages in the sum of not less than five thousand nor more than fifty thousand dollars, to be assessed with reference to the degree of his culpability and distributed as provided in section one . . . a person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the damages shall be assessed with reference to the degree of culpability of his agents or servants. Damages under this section shall be recovered in an action of tort by the executor or administrator of the deceased. No recovery shall be had under this section for death which does not occur within two years after the injury which caused the death. An action to recover damages under this section shall be commenced within two years from the date of death . . . .